No. 93-229

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

LARRY EDWARD DIXON
and
ESTATE OF SALLY DIXON,
by her personal representative,
Johnathan Branch Dixon,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
A Virginia Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT ON PETITIONER LARRY EDWARD DIXON'S FELA CLAIM?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN DENYING RESPONDENT'S MOTION TO BIFURCATE?

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Respondent CSX Transportation, Inc. respectfully submits this Opposition to the Petition for Writ of Certiorari that it received August 12, 1993.

JURISDICTION

This Court's jurisdiction arises under 28 U.S.C. § 1254(1) (1988), not § 1257 as Petitioners incorrectly state.

INTRODUCTION

This case involves a railway grade crossing accident in which a motorist, Petitioner Larry E. Dixon, while driving to do work for one railroad, Southern Railway, happened to be struck by a train operated by another railroad, Respondent CSX Transportation, Inc.,[1] for which he was not working.

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[1] At the time of the accident, CSX was named Seaboard System Railroad, Inc. The name was changed in 1986. To avoid confusion, Respondent will be referred to herein as "CSX." CSX Transportation, Inc. is a wholly-owned subsidiary of CSX Corporation. The following are non-wholly owned subsidiaries of CSX Transportation, Inc.: The Akron Union Passenger Depot Co., Allegheny and Western Railway Co., Augusta and Summerville Railroad Co., The Baltimore and Cumberland Valley Rail Road Extension Co., Beaver Street Tower Co., Belt Railway Co. of Chicago,

In order to avoid the fatal effect of Mr. Dixon's contributory negligence under North Carolina state law[2], Petitioners filed a spurious claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), along with their state law claims. The District Court *first* failed and refused to determine Mr. Dixon's FELA status as a matter of law, *second* failed and refused to have Mr. Dixon's FELA status determined before trial of the liability and damage issues arising on the FELA and state law claims, and *third* tried the

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Central Florida Pipeline Corp., The Central Railroad Co. of South Carolina, Central Transfer Railway and Storage Co., Chatham Terminal Co., The Cleveland Terminal & Valley Railroad Co., Dayton and Michigan Railroad Co., The Home Avenue Railroad Co., The Lakefront Dock and Railroad Terminal Co., Nicholas, Fayette and Greenbrier Railroad Co., Norfolk and Portsmouth Belt Line Railroad Co., North Charleston Terminal Co., Terminal Railroad Association of St. Louis, TTX Co., Winston-Salem Southbound Railway Co. and Woodstock & Blocton Railway Co.

[2] Under North Carolina law, contributory negligence bars recovery. *E.g., Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980).

mutually exclusive FELA and state law claims to the same jury resulting in the introduction of highly prejudicial, inflammatory and incitive evidence on both claims and an unfair trial for CSX.

The Fourth Circuit reversed the judgment on Mr. Dixon's FELA claim because Petitioners failed to prove that he was employed by CSX at the time of his injury as mandated by this Court's holding in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), thereby entitling CSX to judgment n.o.v. The Fourth Circuit also vacated the judgment on the state law claims and ordered a new trial on those claims on the grounds that CSX had been denied a fair trial due to: (1) the District Court's refusal to bifurcate the issues and determine first Mr. Dixon's FELA status, resulting in the introduction of highly prejudicial, inflammatory and irrelevant evidence in the simultaneous trial of the mutually exclusive claims; and (2) the admission of testimony of a "survey" by

Petitioners' human factors expert of how motorists approach the accident crossing which the Court of Appeals found to be erroneous and prejudicial and an independent ground of "reversible error" on both the FELA and state law claims. (App. at A:63)

Petitioners do not challenge or request review of the expert testimony ruling in their Petition for Certiorari. Hence, a new trial is inevitable in this case -- no matter how this Court disposes of the certiorari petition.

Furthermore, for the reasons set forth below, neither of the issues on which Petitioners seek a writ of certiorari is worthy of this Court's review.

STATEMENT OF THE CASE

On November 8, 1985, Mr. Dixon was injured when the car he was driving collided with a train operated by CSX in Mecklenburg County, North Carolina. Mr. Dixon was an employee of the Southern Weighing & Inspection Bureau

(SWIB), an unincorporated association formed early in this century that, at the time of Mr. Dixon's injury, was comprised of some 68 railroads including CSX.[3] SWIB worked with freight shippers and consignors to weigh, classify, mark and pack freight uniformly. In addition to achieving certain economics of scale, SWIB was intended to provide shippers and any subsequent carriers with an independent assessment of the factors used by the initial carrier in setting the freight charges.

At the time of the accident, Mr. Dixon was en route to Blacksburg, South Carolina, to a warehouse where he was

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[3] Petitioners assert that by 1984, the year before Mr. Dixon's accident, SWIB's membership had "declined dramatically." Petition at 19. This is not true and there is no evidence of any such decline in the record. As a result of economic changes in the railroad industry, SWIB was disbanded in 1986. The other weighing and inspection bureaus located in other parts of the country were also disbanded during the 1980s.

to install a transit agreement[4] for Southern Railway, another member of SWIB, that would govern the storage and shipment of wood pulp that was to be transported by Southern Railway to and from the warehouse. CSX did not have any tracks to or from Blacksburg, so it could not transport freight to and from there pursuant to the transit agreement.[5] CSX did not have any knowledge of the work in which Mr. Dixon was

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[4] A transit agreement allows a shipper to have one through rate for his shipment from point of origin to point of ultimate destination rather than a combination of rates to and from a storage facility where the goods might be temporarily stopped or stored.

[5] In their Petition, Petitioners assert without any evidentiary basis in the record that the wood pulp was later going to be shipped to Pennsylvania or Ohio, that Southern Railway would only have been the initial carrier and that the rate set by the Southern Railway tariff would have applied to CSX or any other railroad that participated in the second leg of the shipment. Petition at 16 & n.2. There was no evidence introduced that the wood pulp was to be shipped to Pennsylvania, Ohio or any other known location, that Southern Railway would not be the only carrier or that CSX would ever have transported any freight covered by the transit agreement.

engaged for Southern Railway. Pursuant to SWIB's internal operating procedures, Mr. Dixon and all other SWIB employees were prohibited from disclosing information about work performed for one member railroad, in this case Southern Railway, to any other member railroad including CSX.[6]

Pursuant to SWIB's articles of organization, the installation of transit agreements was left to SWIB's general manager and SWIB personnel. The undisputed evidence showed that the shipper of the wood pulp had contacted SWIB's management and requested that the transit agreement be installed pursuant to a tariff published by Southern Railway. SWIB's division manager then gave Mr. Dixon the

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[6] Petitioners' assertion that this confidentiality rule was created by the member railroads, Petition at 14-15, is again unsupported by the record. The undisputed evidence was that this and all other rules governing the conduct of SWIB employees were established by SWIB's general manager and his subordinants.

specific assignment to go to Blacksburg to install the transit agreement. SWIB allocated Mr. Dixon's time for the day of the accident to Southern Railway. Thus, as the Fourth Circuit noted, "he was effectively paid for his services on that day not by CSX, but by Southern Railway." (App. at A:36)

After receiving this assignment, Mr. Dixon drove his own car towards Blacksburg. The undisputed evidence was that CSX had no right to tell Mr. Dixon what means of transportation to use, what route to travel or how to operate his car in traveling to Blacksburg. If Mr. Dixon had reached Blacksburg, he would have gone to a warehouse where no CSX personnel would have been present. He would have followed SWIB procedures, developed by SWIB management, in performing his duties.

On November 8, 1988, Mr. Dixon filed suit against CSX alleging alternative, inconsistent personal injury claims under FELA and under North Carolina law. His wife Sally

Dixon also asserted a claim for loss of consortium.[7]

On February 14, 1991, CSX moved to bifurcate the trial of the case so as to try first the issue of whether Mr. Dixon was employed by CSX and then, depending on how that issue was resolved, to try *either* Mr. Dixon's FELA claim *or* Petitioners' state law claims.[8] On April 11, 1991, without holding a hearing, Judge McMillan signed an order denying the motion.[9] The order did not contain any explanation of the

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[7] Mrs. Dixon originally asserted her consortium claim under both FELA and state law, but the District Court dismissed the claim under FELA pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That ruling was not appealed.

[8] If Mr. Dixon was "employed by" CSX at the time of his injury within the meaning of 45 U.S.C. § 51 (1988), FELA provides the exclusive remedy. *E.g., New York C. & H.R. R.R. v. Tonsellito*, 244 U.S. 360, 361-62 (1917). If Mr. Dixon was not "employed by" CSX, FELA does not apply and North Carolina law provides whatever remedies Petitioners may have.

[9] Contrary to Petitioners' assertion, the District Court's Pretrial Order did not prohibit CSX from filing the bifurcation

Court's reasoning.[10]

The case was tried before Judge McMillan from June 10 through June 19, 1991. As CSX had forecast in its motion to bifurcate, the simultaneous trial of the incompatible FELA and state law claims resulted in a procedural quagmire that Petitioners artfully exploited. The Fourth Circuit highlighted at length the "inevitable effect" of the denial of the motion to bifurcate:

> As a consequence of the simultaneous trial of the FELA claim and the North Carolina causes of action, the jury heard inflammatory evidence on Mrs. Dixon's loss of consortium that, although relevant to the Dixons' state law claims, was irrelevant to the FELA claim,

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motion. Rather, since the case had previously been on a trial calendar, it merely required that CSX obtain leave of court to file the motion. CSX requested leave to file the motion and the District Court granted leave to file it.

[10] Near the end of the trial, Judge McMillan did not recall that a bifurcation motion had been made and inquired whether anyone had ever objected to trying the incompatible claims together. (Trial Tr. at 1418)

and it heard incitive evidence relevant to the FELA claim that was irrelevant to the Dixons' state law actions. . . .

With respect to the loss of consortium claim, the jury heard emotional testimony from Mrs. Dixon that she had had a "wonderful marriage" with Mr. Dixon; that her husband had always been affectionate and considerate toward her; that the two had had a "wonderful sex relationship"; but that their relationship had been unalterably affected for the worse as a result of the accident. *Id.* at 785-87, 791-92, 807. This testimony was so powerful that, according to CSX, *see* Appellant's Br. at 45, several jurors openly wept during its presentation. Additionally, the Dixons introduced birthday and anniversary cards that they had exchanged over the years as evidence of the quality of the relationship that they had enjoyed prior the accident. J.A. at 805-07, 1138-61.

The jury also viewed the videotaped deposition of Dr. Kirkwood Schultz, who testified that the accident had plunged Mrs. Dixon into a severe suicidal depression and forced her to work "when her feet were rotting off and pus was running out of her feet" and otherwise to jeopardize her health in order to keep the family together. *Id.* at 698-99. All of this evidence, of course, was admissible on the issue of Mrs. Dixon's

damages, and perhaps even on the issue of Mr. Dixon's damages, under state law. Because loss of consortium is not actionable under FELA, however, *see supra* note 3, this highly prejudicial evidence was irrelevant to Mr. Dixon's FELA claim. . . .

With respect to Mr. Dixon's FELA claim, the jury heard extensive testimony on the question of whether Mr. Dixon was employed by CSX. Two former SWIB employees testified that they considered themselves CSX employees and Mrs. Dixon and her son testified that they believed Mr. Dixon worked for the railroad. J.A. at 536-37, 559-60, 579-81, 770-71, 783-84. There was also testimony from the former general manager of SWIB that Mr. Dixon was covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, *id.* at 519-21, 525-26, statutes that differ significantly from FELA in that they expressly cover weighing and inspection bureau employees, *see* 45 U.S.C. §§231(a)(1)(i), (iv); 351(a), (b). Appellees presumably intended for the jury to infer from this testimony that Dixon was, or at least thought he was, a railroad employee for purposes of FELA.

This testimony regarding Mr. Dixon's employment served as the foundation for Dixon's closing argument in which counsel characterized CSX as a "ruthless" employer

> more concerned with "the bottom line" than with the well-being of its employees, J.A. at 964; an employer that "no longer want[ed] to have to contribute to [its] responsibilities to the employees [it] formerly had [*i.e.*, Mr. Dixon]," *id.* at 941; and an employer that had bullied employees, threatening them with termination if they did not testify in the railroad's favor at Mr. Dixon's trial. *Id.* at 963-64. While all of this testimony was relevant to an issue that was indisputably central to Dixon's FELA claim, it was wholly irrelevant to the Dixons' state law claims and undoubtedly prejudicial to CSX, especially given the way in which it was drawn together by counsel in closing argument. (App. at A:10 to 16) (footnote omitted)

After denying CSX's motions for directed verdict, the District Court allowed the jury to return two verdicts in favor of Petitioners. The first verdict awarded Mr. Dixon $13,609,308 on his FELA claim. The second verdict awarded Mr. Dixon the *identical* amount on his state law claims, although the jury had been instructed to apply a substantially different measure of damages than it had applied on the FELA

claim,[11] and awarded Mrs. Dixon $1,500,000 for her loss of consortium. As the Fourth Circuit's assessed the result:

> Although these significantly different methods for calculating damages would almost inescapably result in different damage awards, the jury awarded Mr. Dixon precisely the same amount ($13,609,308) on his North Carolina and FELA claims. It is evident from the identical verdicts that the jury was unable to distinguish between the FELA and the state law claims, at least insofar as the measures of damages were concerned. (App. at A:18 to 19) (footnote omitted)

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[11] The jury was instructed that wage losses under FELA are computed after the deduction of taxes, *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), but not under North Carolina law, *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982), that loss of enjoyment of life is an element of the pain and suffering damages available under FELA, *e.g., Dugas v. Kansas City Southern Ry. Lines*, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973), but not under North Carolina law, and that future pecuniary damages should be reduced to present value under FELA, *e.g., Monessen S. Ry. v. Morgan*, 486 U.S. 330 (1988), but under North Carolina law all future damages, including pain and suffering, must be reduced to present value, *e.g., Shipp v. United Stage Lines, Inc.*, 192 N.C. 475, 135 S.E. 339 (1926).

The District Court then entered an alternative judgment that Mr. Dixon recover $13,609,308 under FELA and that "in the event that the Plaintiff Larry Edward Dixon's recovery under the FELA is not sustained on appeal" Mr. Dixon recover $13,609,308 and Mrs. Dixon recover $1,500,000 under North Carolina law. CSX's motions for judgment notwithstanding the verdict and a new trial were denied.

On appeal, the Fourth Circuit in an opinion by Circuit Judge J. Michael Luttig first held that the District Court had abused its discretion in denying CSX's motion to bifurcate. The Court recognized that "trial courts must be given wide latitude in managing the litigation before them," but held that "under the particular circumstances of this case" the motion to bifurcate should have been granted. (App. at A:10) As quoted above, the Court analyzed the effect of the "inflammatory," "incitive" and "highly prejudicial" evidence

that the joint trial permitted Petitioners to introduce and the ensuing jury confusion which lead it to conclude:

> The district court undoubtedly believed that the simultaneous trial of these two alternative causes of action would conserve judicial resources and save all parties and witnesses time and expense. Whether or not these laudable goals were served by the single proceeding, "a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1040 (1984). In the circumstances of this case, we are left with the firm conviction that, because the district court tried the federal and state claims together, thereby exposing the jury to the inflammatory and irrelevant evidence on the respective claims recited above, CSX did not receive a fair trial on either the FELA or the state law claims. (App. at A:19-20)

Second, the Fourth Circuit, applying this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), held that the District Court erred in denying CSX's

motions for directed verdict and JNOV on the FELA claim.

As the Court explained:

> Under these circumstances, we do not believe that jurors, applying the factors set forth in *Kelley*, could reasonably conclude that Mr. Dixon was employed by CSX at the time of his injury. Mr. Dixon clearly was not performing services for CSX. As a SWIB traveling agent, he was on assignment to perform services on behalf of SWIB member Southern Railway. Even if Mr. Dixon were deemed to be performing services for each member railroad whenever he performed services for any one of the railroads or for SWIB as an association, and thus were regarded as having been performing services for CSX at the time of the accident, he certainly was not in any sense subject to CSX's control during the performance of these services. He was subject to control only by SWIB and, arguably, Southern Railway. CSX did not even know where Mr. Dixon was at the time of the accident or what work he had been assigned to perform that morning. And because his time on the day of the accident was allocated to Southern, he was effectively paid for his services on that day not by CSX, but by Southern Railway. (App. at A:34 to 36) (citations omitted)

Finally, the Fourth Circuit also held that the District

Court committed "reversible error" in admitting testimony from a "human factors" expert about a survey conducted three years after the accident concerning how various percentages of motorists approached the grade crossing *with no train present*. Mr. Dixon's counsel used the expert's testimony to argue to the jury that they could not find Mr. Dixon contributorily negligent because he drove as well or better than most of the motorists observed in the study. The Court of Appeals held this testimony was inconsistent with the objective standard of a reasonably prudent person and should not have been admitted. (App. at A:59 to 63)[12]

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[12] Because of the way it resolved the appeal, the Fourth Circuit did not address a number of other issues. These included (i) whether the District Court erred in admitting evidence that Mr. Dixon as a SWIB employee was covered by the Railroad Retirement Act and the Railroad Unemployment Insurance Act which unlike FELA expressly cover weighing and inspection bureau employees, (ii) whether the District Court erred in admitting lay opinion testimony from Mrs. Dixon and former SWIB employees that Mr. Dixon was an employee of CSX and covered by FELA, (iii) whether Judge

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' RULING ON THE FELA QUESTION

A. Petitioners Have Not Previously Raised The Question Of Whether The Southern Weighing & Inspection Bureau Was A Device To Avoid FELA Liability

Petitioners state the first question in their Petition as whether "a railroad [can] avoid coverage under the Federal Employer's Liability Act by joining with other railroads in an

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McMillan erred during his jury charge in summarizing the purported "testimony" of Mr. Dixon who did not testify and cannot speak *and* a series of legal contentions of which there was no evidence and which Petitioners did not assert, (iv) whether Mr. Dixon's attorney made improper remarks in closing argument, (v) whether the damages awarded were not supported by the evidence, inconsistent or excessive, (vi) whether the consortium award was the product of inflammatory uncorroborated hearsay about a purported suicide attempt by Mrs. Dixon, and (vii) whether the District Court erred in submitting the state law claims to the jury after they had returned a verdict finding that Mr. Dixon was covered by FELA.

unincorporated association for the purpose of jointly employing persons to do work exclusively for the member railroads." Petition at i. Petitioners have not previously raised this argument in either the District Court or the Fourth Circuit; the Fourth Circuit did not rule that a railroad can avoid FELA coverage by joining an unincorporated association; and there is no evidence to support such an argument.

The FELA provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55 (1988). Petitioners did not allege in the complaint that SWIB was a device to avoid FELA coverage, did not present evidence of any such theory at trial, did not argue a violation of § 55 to either the District Court or the Court of Appeals and still do not even cite § 55 in their

petition for certiorari. This Court does not review questions that were not raised below. *E.g., Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).

B. The Fourth Circuit Did Not Purport To Immunize Members Of An Unincorporated Association From FELA Liability

Contrary to Petitioners' entire presentation of their first question, the Fourth Circuit did not even purport to immunize the members of an unincorporated association from FELA liability. If the Court of Appeals had concluded that there was evidence from which a jury reasonably could have found that Mr. Dixon was employed by CSX at the time of his injury, but nevertheless concluded that CSX was not liable because the services were performed through SWIB, then Petitioners' distorted statement of the FELA coverage question might have some validity. The Fourth Circuit merely held that Mr. Dixon was not "employed by CSX at the time of his injury" because he "clearly was not performing services for CSX" and

"he certainly was not in any sense subject to CSX's control during the performance of these services." (App. at A:34 to 35)

C. There Was No Evidence To Support Petitioners' Belated "Device" Argument

Even if Petitioners had raised a § 55 issue below, there is absolutely no evidence to sustain such a contention. The express terms of § 55 only condemn those devices "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" under FELA. 45 U.S.C. § 55 (1988). The courts of appeals have consistently interpreted the statute to apply only when there is proof of such an intent. *E.g., Selser v. Pacific Motor Trucking Co.*, 770 F.2d 551, 554 (5th Cir. 1985); *Dougall v. Spokane P. & S. Ry.*, 207 F.2d 843, 847 (9th Cir. 1953). There is no

evidence of such purpose or intent on this record.[13] Nor is there any reason for the Court to review the meaning of § 55

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[13] As noted, SWIB was formed in the early 1900's to provide a variety of services throughout the southern United States for its railroad members and shippers, including installing transit agreements such as the one that Mr. Dixon was en route to install. In addition to achieving certain economics of scale, SWIB and the comparable weighing and inspection bureaus located in other parts of the country provided both shippers and other railroads with an independent assessment of the weight and other factors that fixed the freight charges for a shipment. The bureaus thus existed for economic reasons wholly independent of FELA. When economic conditions changed in the 1980's so as to eliminate most of the types of accounts serviced and policed by the bureaus, they were disbanded even though FELA continues to apply to their former member railroads.

Finally, the employees of SWIB and the other bureaus mostly performed paperwork, hardly the type of work that would have exposed the member railroads to any significant FELA exposure. This is well illustrated by the fact that apparently only one other case has involved an attempt by a weighing and inspection bureau employee to recover from a member railroad under FELA. *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977) (copy attached) (holding plaintiff not employee of defendant railroad). Indeed, the risk to which Mr. Dixon was exposed at the time of this crossing accident case had nothing to do with his job and would have been the same if he had been driving to the grocery store or laundry.

which is well settled.

In sum, there was no evidence whatsoever that SWIB was a device to avoid FELA liability. On the contrary, it was Petitioners who sought to expand FELA coverage so that every SWIB employee would be a FELA employee of each and every one of the 68 member railroads at all times and at all places that the employee was working. The Court of Appeals properly rejected such an unprecedented expansion of FELA coverage. (App. at A:36 to 38)

D. The Court Of Appeals Correctly Decided The FELA Question That Was Raised Below

There is no reason to grant certiorari to review the FELA question actually posed by this case, whether the Court of Appeals erred in holding that the District Court should have granted CSX's motion for judgment notwithstanding the verdict on Mr. Dixon's FELA claim. Indeed, not even Petitioners urge review of this intensely fact-bound issue.

A FELA action will not lie unless Mr. Dixon established, among other elements, that he was "employed by" CSX at the time of his injury. 45 U.S.C. § 51 (1988). If the pertinent facts are not in dispute, this is a question of law for the Court. *E.g., Hull v. Philadelphia & R. Ry.*, 252 U.S. 475 (1920). Petitioners have not identified any disputed issues of material fact in their Petition to this Court.[14]

This Court has recognized on a number of occasions that the FELA does not apply to everyone employed in connection with the operation of a railroad. *E.g., Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968) (employee of railroad refrigeration car company not covered); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) (employee of railroad express

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[14] Petitioners conceded in oral argument before the Court of Appeals that the material facts concerning Mr. Dixon's employment status were not in dispute and argued that Mr. Dixon was covered by FELA as a matter of law. *See* App. at A:36.

company not covered); *Robinson v. Baltimore & O. R.R.*, 237 U.S. 84 (1915) (employee of Pullman Company not covered). Rather, in enacting the FELA, Congress used the words "employed by" in their natural sense to require that the common law relationship of master and servant exist between the plaintiff and a common carrier by railroad at the time of injury. *E.g., Kelley v. Southern Pacific Co.*, 419 U.S. at 323-24. The FELA does not provide any right of action against *non-employer* rail carriers involved in a railroad accident.

This Court has defined a servant in the following terms:

> "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

Id. at 324 (quoting Restatement (Second) of Agency § 220(1)

(1958)).[15] Thus, to establish that he was "employed by" CSX for FELA purposes, Mr. Dixon had to prove two facts: (1) that at the time of his accident he was performing services for CSX, *e.g.*, *Linstead v. Chesapeake & O. Ry.*, 276 U.S. 28, 33-34 (1928); *Johnson v. Louisville & N. R.R.*, 394 S.W.2d 110, 112 (Ky. 1965), *cert. denied*, 384 U.S. 921 (1966); and (2) that CSX controlled or had the right to control his physical conduct in the performance of the services in which he was engaged at the time of the accident, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 324, 327 & n.9.

The undisputed evidence showed that at the time of Mr. Dixon's injury he was not performing any services whatsoever

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[15] Petitioners selectively quote this standard, omitting the requirement that the master must control or have the right to control the servant's "physical conduct in the performance of the services." *See* Petition at 28. A worker is not a servant of a railroad for FELA purposes if the railroad merely controlled or had the right to control the result to be achieved. *E.g.*, *Chicago, R.I. & P. Ry. v. Bond*, 240 U.S. 449, 456 (1916).

for CSX. In addition, CSX did not control and had no right to control how he performed his job at the time of his injury. Indeed, CSX did not give him any directions on how to get to Blacksburg, did not give him any instructions as to how to do his job in Blacksburg and did not even know he was going there because SWIB's employees were forbidden to discuss the affairs of one railroad with another railroad. On the day in question, Mr. Dixon was doing the work of Southern Railway. At most, Mr. Dixon "was subject to control only by SWIB and, arguably, Southern Railway" on the day of the accident. (App. at A:36)

Petitioners devote a considerable portion of their Petition to a description of the participation of the 68 member railroads in the various committees of SWIB and the fact that a CSX vice president served on various committees and at the time of the accident was acting as chairman of SWIB following the resignation of the previous chairman. This

Court has repeatedly emphasized that the defendant railroad must exercise or have the right to exercise "immediate control and supervision" over the details of the work, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 330 n.10; *Shenker v. Baltimore & O. R.R.*, 374 U.S. 1, 6 (1963), and has distinguished such "authoritative direction and control" from the minimum cooperation that is necessary to carry on any coordinated undertaking. *E.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 329-30 & n.10. Mere participation in the management of SWIB did not give CSX "immediate" or "authoritative" control over the performance of a project of which CSX was not even aware.[16]

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[16] Petitioners also misstate the involvement that the railroad representatives played in SWIB during the mid-1980's. The evidence was that SWIB was in the process of disbanding and that the only activity of the railroad representatives was to approve continued use of a prior budget and to wrap up the affairs of the bureau.

E. The Court Of Appeals' Decision Of The FELA Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court

Counsel for Respondent have located only one case that has considered whether an employee of a weighing and inspection bureau was employed by a member railroad for purposes of FELA. In *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977)(copy attached), District Judge Edward J. Devitt granted summary judgment for the defendant railroad, holding that the plaintiff was not an employee of the railroad for FELA purposes.

The three Court of Appeals cases decided under FELA cited by Petitioners do not involve weighing and inspection bureaus or factual situations even remotely analogous to this case. *Lindsey v. Louisville & N. R.R.*, 775 F.2d 1322, 1324-25 (5th Cir. 1985), *Bradsher v. Missouri Pacific R.R.*, 679

F.2d 1253, 1255-56 (8th Cir. 1982), and *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 198-99 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), involved plaintiffs who were employed by the defendant railroads' subsidiaries or other entities and were injured while loading, unloading or cleaning the defendant railroads' cars in the defendant railroads' rail yards under the direction of the defendant railroads' employees.[17]

Similarly, the only FELA case decided by a state court of last resort that Petitioners cite involved a totally

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[17] Petitioners also cite, as conflicting with the Fourth Circuit's decision, a decision of the Seventh Circuit, *Walling v. Western Weighing & Inspection Bureau*, 160 F.2d 47 (7th Cir. 1946), under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988). As the Fourth Circuit observed, App. at A:24 & n.6, however, the test of employment under the Fair Labor Standards Act is not the common law master-servant standard applicable under FELA. *E.g., Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

distinguishable situation.[18] In *Seaboard Coast Line R.R. v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975), the plaintiff was employed by the Clinchfield Railroad Co., a partnership comprised of the defendants Seaboard Coast Line Railroad Co. and Louisville & Nashville Railroad Co. Under well-established common law principles, the work performed by an employee of a partnership is by definition the work of each partner and each partner has the right to control the manner in which that employee performs the work. The same is not true of an unincorporated association. *See, e.g., Feldman v. North*

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[18] Petitioners also cite a decision of an intermediate appellate court in New Jersey, *Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 356 A.2d 4 (App. Div. 1976). This Court's rules provide that a conflict to warrant certiorari must be with a state court "of last resort." Sup. Ct. R. 10.1(a). Moreover, in *Pelliccioni*, the accident happened in the railroad's yard while the plaintiff was operating a yard tractor to move truck trailers that were either incoming or outgoing on the railroad's trains and neither plaintiff nor his nominal employer, a wholly-owned subsidiary of the railroad, ever worked on any railroad business other than that of the railroad defendant.

British & Mercantile Ins. Co., 137 F.2d 266, 268 (4th Cir. 1943) (mere membership in unincorporated association does not subject members to liability for unlawful acts of employee of association).

In an effort to manufacture a conflict where none exists, Petitioners cite and discuss at some length a number of cases decided under state workers' compensation laws.[19] Petition at 23-25, 33-39. These cases do not involve FELA, but rather a variety of state statutes. Further, they do not involve an unincorporated association such as SWIB, but rather partnerships or joint ventures or employees concededly hired

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[19] Petitioners predicate this argument on dictum in a Fifth Circuit case, *Lindsey v. Louisville & N. R.R.*, 775 F.2d 1322, 1324 (5th Cir. 1985), where the Court, without citation of any authority, stated that the test of FELA coverage is "the established test in workers' compensation cases." The *Lindsey* Court plainly did not intend to incorporate by reference the varied coverage provisions of the nation's 50 plus workers' compensation statutes. Rather, the Court immediately quoted and then applied this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974). 775 F.2d at 1324.

by two different entities. Finally, none of them involves a fact situation comparable to this case: an employee of an unincorporated association seeking to recover from a member of the association for whom the employee was not performing any services and who did not control the employee's physical conduct in the performance of his work at the time and place of the accident.

F. The FELA Question Is Not Important Enough To Warrant Certiorari

The Fourth Circuit merely applied principles of law long settled by this Court to a fact situation that is not likely to recur. This Court has consistently held since shortly after the FELA was passed that Congress used the words "employed by" in § 51 to refer to a common law master-servant relationship. *Robinson v. Baltimore & O. R.R.*, 237 U.S. 84, 94 (1915). It has reaffirmed that principle on a number of occasions, most recently in *Kelley v. Southern Pacific Co.*,

419 U.S. at 323-24. The Fourth Circuit correctly applied these principles to the uncontradicted evidence of this case where the plaintiff was employed by an unincorporated association of more than five dozen railroads and was not performing services for the defendant railroad at the time of his injury.

As noted above, this case and *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977), are apparently the only cases that have addressed whether a plaintiff employed by such an unincorporated association of railroads has a right of action under FELA against a member railroad. Thus, the issue appears to be one of only limited significance. In addition, SWIB and the other weighing and inspection bureaus have been disbanded as a result of economic changes in the railroad industry so the factual situation presented in this case is not likely to recur.

II. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' RULING ON RESPONDENT'S MOTION TO BIFURCATE

A. The Court Should Not Grant Certiorari On The Bifurcation Question Because Petitioners Have Conceded That The Case Must Be Retried

This Court has long refrained from rendering advisory opinions, deciding questions that are moot or not yet ripe and addressing issues that are only of scholarly interest. *E.g.*, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 305 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625, 632-33 (1979); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Considerations of this sort ensure that this Court's role is carefully limited to decision of actual controversies in which the parties have a concrete stake.

As noted in the Statement of the Case, the Court of Appeals vacated the District Court's decision and remanded

the case for a new trial because the District Court committed *three* errors in the trial of this cause: (1) denying CSX's motion to bifurcate; (2) denying CSX's motion for judgment notwithstanding the verdict on the FELA claim; and (3) admitting testimony from an expert witness that was contrary to the standards of the applicable substantive law. Petitioners have not asked the Court to review the Fourth Circuit's holding that *the case must be retried because of the improper admission of expert testimony*. Since this Court does not review questions that are not raised in the certiorari petition, Sup. Ct. R. 14.1(a), there will have to be a new trial regardless of this Court's disposition of the certiorari petition. The most that would be determined by any proceedings before this Court is whether that trial will involve a FELA claim, a FELA claim and state law claims or just state law claims.

As argued in the preceding section of this Brief, the FELA question does not warrant certiorari. If the Court does

not grant certiorari on that question, the FELA claim will no longer be in issue and the new trial will be limited to the state law claims so any decision this Court might make on the bifurcation question would not affect the further course of proceedings in this action.

B. The Fourth Circuit Correctly Held The District Court's Failure To Bifurcate Was The Direct Cause Of The Unfair Trial Of Both The FELA And State Law Claims

The Federal Rules of Civil Procedure allow virtually unlimited joinder of claims and parties at the pleading stage, *see* Fed. R. Civ. P. 8(e)(2), 18, 19, 20, but give the district courts the authority to sever claims, *id.* 21, and to order separate trials of claims or issues to prevent or avoid prejudice, *id.* 20(b), 42(b). In an en banc decision rendered 10 years ago, the Fourth Circuit set forth the controlling standard that it applied in this case:

> [A] trial must remain fair to both parties, and such considerations of convenience may not

> prevail where the inevitable consequence to another party is harmful and serious prejudice. *Molever v. Levenson*, 539 F.2d 996, 1003 (4th Cir.1976), *cert. denied*, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 625 (1976). Consolidation, or refusal to sever, where prejudice results under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error. *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir.1966), *cert. denied*, 386 U.S. 958, 87 S.Ct. 1027, 18 L.Ed.2d 106 (1967).

Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 906 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

A FELA claim differs significantly from a negligence claim arising under North Carolina law. While both claims involve issues of negligence and contributory negligence, the FELA issues are controlled by federal law which may impose duties on a railroad as employer and a plaintiff as employee that differ substantively from those imposed by state law. *See, e.g., Cazad v. Chesapeake & O. Ry.*, 622 F.2d 72, 75 & n.3 (4th Cir. 1980). North Carolina continues to follow the

common law rule that any contributory negligence bars recovery. *E.g., Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). The FELA employs a modified form of comparative negligence. 45 U.S.C. § 53 (1988). In addition, as noted above, the measures of damages differ substantially.[20] Finally, and perhaps most significantly for this lawsuit, FELA does not permit recovery for Mrs. Dixon's loss of consortium, *e.g., Kelsaw v. Union Pacific R.R.*, 686 F.2d 819, 820-21 (9th Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983), but North Carolina law does, *e.g., Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980).

By denying CSX's motion to bifurcate, the District Court opened the door for Petitioners to introduce what the Fourth Circuit described as "inflammatory," "incitive" and "highly

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[20] *See* note 11 *supra*.

prejudicial" evidence which, as the Fourth Circuit also noted, ultimately resulted in demonstrable confusion of the jury. (App. at A:10, 11, 13, 16) *See* pages 10-14 *supra*.

C. The Court Of Appeals' Decision Of The Bifurcation Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court

Petitioners have cited only one FELA case that they claim conflicts with the Court of Appeals' decision. In *Durham v. Southern Ry.*, 254 F. Supp. 813, 814-16 (W.D. Va. 1966), a district court refused to bifurcate a state law wrongful death claim against one defendant from two FELA claims against other defendants. The decision was not appealed and, in any event, it does not involve mutually exclusive claims so it does not conflict with the Court of Appeals' decision in this case. The risks of prejudice and jury confusion are substantially less when the different claims are

asserted against different defendants.[21]

Unable to find any conflicting FELA cases, Petitioners argue that the Fourth Circuit did not evaluate the District Court's denial of the motion to bifurcate as of the time it was made but improperly looked at what in fact happened at trial, an analysis that Petitioners assert conflicts with that followed by other courts of appeals. The cases Petitioners cite on this point, Petition at 44, do not support such a rule.[22]

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[21] The North Carolina General Assembly apparently believes that even in that situation the risk of confusion is too great. When a plaintiff asserts a FELA claim against one defendant and a state law claim against another for the same injuries, the North Carolina General Statutes provide that the damages shall be determined under the provisions of FELA. N.C. Gen. Stat. § 1B-1(i)(3)(1983). That statute does not apply to alternative claims against the same defendant.

[22] *Stich v. United States*, 730 F.2d 115, 117 (3d Cir.), *cert. denied*, 469 U.S. 917 (1984), involves the district court's discretion in admitting evidence, not in severing claims or issues for trial. *Rossanno v. Blue Plate Foods, Inc.*, 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963), uses the words "[w]hen the ruling was made" quoted by Petitioners as a preface to a description of the record before the district

In addition, Petitioners' argument misinterprets the Fourth Circuit's decision and reasoning. A district court's decision will not be reversed on appeal merely because it is erroneous. The error must be prejudicial. In this case, it was necessary for the Fourth Circuit to focus on what transpired at trial to point out that the District Court's denial of CSX's motion to bifurcate and simultaneous trial of the FELA and state law claims did seriously prejudice CSX. This is not contrary to the decisions of other courts of appeals, but rather is fully consistent with fundamental precepts of appellate

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court when it ruled, but does not state that the appellate court may not consider the consequences of the district court's ruling in determining whether it abused its discretion. Finally, in *United States v. Calabrese*, 645 F.2d 1379, 1385 (10th Cir.), *cert. denied*, 451 U.S. 1018 (1981), the Court of Appeals' statement quoted by Petitioners that it "cannot by hindsight find an error on this basis" refers to the "unexpected conduct" of an attorney or party that required a mistrial in that case and does not purport to prohibit an appellate court from considering the consequences of a district court's ruling in reviewing it.

review.

Finally, Petitioners erroneously assert that the Fourth Circuit's ruling is in conflict with this Court's decision in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Contrary to Petitioners' assertion, *Fitzgerald* dealt with the problem of trying jury and non-jury claims in the same proceeding, a concern that has nothing to do with this case.[23]

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[23] In *Fitzgerald*, the plaintiff asserted a claim under the Jones Act, 46 U.S.C. § 688 (1988), as to which there was a right to a jury trial, and a claim for maintenance and cure under admiralty law, as to which no right to a jury existed, two cumulative claims that involved some, but not all, of the same elements of damages. The district court tried the Jones Act claim to a jury and then took additional evidence and decided the admiralty claim itself. This Court held that procedure to be error, reasoning that it complicated and confused the trial, created difficulties in applying the doctrines of res judicata and collateral estoppel and could easily result in too much or too little recovery since the interrogatories submitted to the jury were not (and as a practical matter could not be made) sufficiently detailed to determine what factual findings the jury had made and what elements of loss their verdict had compensated. *Id.* at 19-20.

The procedure CSX proposed in its motion to bifurcate posed none of the risks that concerned this Court in

D. The Bifurcation Question Is Not Important Enough To Warrant Certiorari

Contrary to Petitioners' parade of horrors, the Court of Appeals' ruling on the bifurcation motion will not dramatically affect the trial of all complex cases in the federal courts[24] and does not purport to alter the District Court's broad discretion

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Fitzgerald. CSX asked the District Court to try first the issue of whether Mr. Dixon was employed by CSX within the meaning of the FELA and then, depending on the answer to that issue, to try *either* the FELA claim *or* the state law claims. The first jury verdict would not have answered any issue that would have been raised in the second phase. In addition, unlike the Jones Act and maintenance and cure remedies which are cumulative, the FELA remedy if applicable is exclusive. *E.g., New York C. & H.R. R.R. v. Tonsellito*, 244 U.S. 360, 361-62 (1917). Thus, if CSX's proposed procedure had been followed, there would not have been two recoveries to integrate and no risk of too much or too little recovery.

[24] Petitioners underestimate the frequency with which the trials of complex cases are bifurcated. *See, e.g., In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (describing the "now-standard practice" of bifurcating patent issues and antitrust issues in cases involving both).

in matters of this type. *See* pages 15-16 *supra*.

Petitioners claim that the Court of Appeals' decision is unique in holding a denial of a motion to bifurcate to be an abuse of discretion, but they define the issue too narrowly in making that assertion. Courts of appeals have on a number of occasions found that district courts abused their discretion in consolidating claims or issues for trial, *e.g.*, *Arnold v. Eastern Air Lines, Inc*, 712 F.2d at 906-07; *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196-97 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967), and in severing claims or issues for trial, *e.g.*, *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961). In a variety of situations they have preempted the district court's discretion by directing a district court to try a certain type of claim separately on remand. *E.g.*, *Cavanaugh v. Western Maryland*

Ry., 729 F.2d 289, 294-95 (4th Cir.), *cert. denied*, 469 U.S. 872 (1984) (directing district court to try plaintiff's FELA claim separately from railroad's state law counterclaim); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976) (per curiam). *See also Sporia v. Pennsylvania Greyhound Lines, Inc.*, 143 F.2d 105 (3d Cir. 1944) (abuse of discretion not to sever claims under Rule 21). In each situation, the court must weigh the benefits in efficiency against the risk that one party or the other will be prejudiced.[25] Rule 42 gives the district judges discretion in weighing that balance. Contrary to Petitioners' implicit assertion, it does not immunize that ruling from appellate review.

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[25] Petitioners cite a consolidation case, *Ikerd v. Lapworth*, 435 F.2d 197 (7th Cir. 1970), in discussing when bifurcation is appropriate, Petition at 47 n.8, thus at least implicitly recognizing that consolidation and bifurcation present the same basic problems and warrant the same scope of appellate review.

In an unusually fact-specific decision in a case involving a rare configuration of evidence and claims, the Fourth Circuit correctly ruled that the District Court abused its discretion in denying CSX's motion to bifurcate and amply supported its conclusion that CSX was denied a fair trial. The decision of the Fourth Circuit is correct and does not warrant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Thomas Ashe Lockhart

Counsel of Record

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-76-Civil-568

Memorandum and Order

Dean Neil Newton and Barbara Ann Newton, individually and as husband and wife,

Plaintiffs,

vs.

Western Weighing & Inspection Bureau and Western Railroad Association, The Atchison, Topeka & Santa Fe Ry. Co., Burlington Northern, a Delaware Corporation, Chicago & Northwestern Transportation Co., a Delaware Corporation, Duluth, Missabe & Iron Range Ry. Co., The Milwaukee Motor Transportation Company a/k/a The Milwaukee Road, a Wisconsin Corporation, Soo Line R.R. Co., a Minnesota Corporation, and Toledo, Peoria & Western R.R. Co.,

Defendants.

HARRY A. SIEBEN, JR., Minneapolis, Minnesota, attorney for plaintiffs.

PATRICK J. McPARTLAND, Minneapolis, Minnesota, attorney for defendant Soo Line Railroad Company.

ROGER R. ROE, JR., Minneapolis, Minnesota, attorney for defendants Milwaukee Motor Transportation Co., Western Weighing & Inspection Bureau and Western Railroad Association.

WILLIAM M. BURNS, Duluth, Minnesota, attorney for defendant Duluth, Missabe & Iron Range Railway Co..

EDWARD M. GLENNON, Minneapolis, Minnesota, attorney for defendants Atchison, Topeka and Santa Fe Railway Co., Chicago and Northwestern Transportation Co. and Peoria & Western Railroad Co.

RICHARD V. WICKA, St. Paul, Minnesota, attorney for defendant Burlington Northern.

Plaintiff instituted this lawsuit under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., alleging that defendants are liable for injuries he suffered in an industrial accident. Plaintiff, an

employee of defendant Western Weighing and Inspection Bureau (W.W.I.B.), a division of defendant Western Railroad Association (W.R.A.), was injured as he was installing grain doors in a Burlington Northern box car on tracks near the Republic grain elevator in Minneapolis. Installation of grain doors, a process known as "coopering," is required on all boxcars in which grain is shipped and is a service performed by W.W.I.B. employees for defendant railroads. The W.R.A. is an unincorporated service association headquartered in Chicago and controlled by a number of railroads.

All defendants have filed motions for summary judgment which, for the purposes of discussion, may be broken down into two groups: those brought by the railroads and Milwaukee Motor Transport and those brought by W.W.I.B. and W.R.A. Defendants

have filed legal memoranda and affidavits in support of these motions and plaintiff has submitted a brief and an affidavit of his attorney in opposition to them. Based on the pleadings, the answers to interrogatories and affidavits on file, defendant's motions are granted.

The Federal Employers' Liability Act provides that [e]very common carrier by railroad ". . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . ." W.W.I.B. and W.R.A. contend that neither is a "common carrier by railroad" and the rest of the defendants contend that plaintiff was not in their employ at the time of the accident. Plaintiff counters by arguing that W.W.I.B. and W.R.A. are merely agents of the railroads and that, therefore, all defendants are subject to suit under F.E.L.A. and that, in all events, the questions

of whether he was an employee of the railroads or whether W.W.I.B. and W.R.A. are common carriers by rail are fact questions which a jury must resolve.

Turning first to those motions brought by the railroads and Milwaukee Motor Transport, it is clear that they must be granted because the uncontroverted facts contained in defendants' affidavits clearly demonstrate that plaintiff was not in their employ at the time of the accident. It is true, as plaintiff asserts, that whether he is an employee of the railroads is a fact question. Baker v. Texas & P. Ry., 359 U.S. 227, 229 (1959). It is, perhaps more appropriate to say that this is really a conclusion which may be drawn from a number of facts, primarily whether the putative employer exercised control or had the right to exercise control over the details of plaintiff's job. Kelley v. Southern

Pacific Co., 419 U.S. 318, 326 (1974). The affidavits on file indicate that the railroad defendants and Milwaukee Motor Transport did not exercise control over and did not have the right to exercise control over the details of plaintiff's job.

In his memorandum of law submitted in opposition to these motions, plaintiff concludes that it "strains credulity to suggest that positively no one of the member railroads has the authority to direct the operation of one of the divisions of its own service organization." However, the affidavit of his attorney submitted in opposition to these motions does not contain facts which support this conclusion or controvert the factual contentions established by defendants' affidavits. It is of course an elementary principle of law that a party may not rest on allegations contained in the pleadings to resist

summary judgment motions supported by affidavits. Lyons v. Board of Education of Charleston, 523 F.2d 340 (8th Cir. 1975), Langeslag, et al. v. St. Paul Union Depot Co., et al., 3-75-Civ-60 (D. Minn. March 10, 1976). Consequently summary judgment in favor of the railroads and Milwaukee Motor Transport is appropriate.

Because neither is a "common carrier by railroad" as required by F.E.L.A., the motions of the W.W.I.B. and W.R.A. must also be granted. In Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187 (1919), the court indicated that "the words 'common carrier by railroad' as used in the Act, mean one who operates a railroad as a means of carrying for the public - that is to say, a railroad company acting as a common carrier." Information contained in answers to Interrogatories, uncontroverted by

plaintiff, indicates that W.W.I.B. is a division of W.R.A. which is "an independent contractor engaged by various line haul carriers located west of the Mississippi River to perform various services." Uncontroverted information contained in the affidavits indicates that W.W.I.B. "owned no rolling stock, locomotive engins or the like and, further W.W.I.B. did not hold itself out as available to carry either persons or freight for hire."

In conclusion, the established facts clearly demonstrate that defendants W.W.I.B. and W.R.A. are not common carriers by railroad and that plaintiff was not an employee or subservant of any of the other defendants. Because there are no material facts in dispute and defendants are entitled to judgment as a matter of law, their motions for summary judgment are granted.

The seeming harshness of this result is mitigated by the fact that it does not leave plaintiff remediless. The court's ruling only means that plaintiff may not proceed in federal court under the F.E.L.A. If he has a meritorious claim he may proceed against the proper parties with a negligence lawsuit brought under state law.

IT IS ORDERED that defendants' motions for summary judgment are GRANTED. The clerk is directed to enter judgment.

Dated: May 13, 1977.

EDWARD J. DEVITT,
Chief Judge
United States District Court